No. 15580

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

E. S. McKENZIE, FLORENCE LOWE BARNES, also known as PANCHO BARNES, and WILLIAM EMMERT BARNES,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

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No. 15580

IN THE

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FOR THE NINTH CIRCUIT

E. S. McKendry, Florence Lowe Barnes, also known as Pancho Barnes, and William Emmert Barnes,

Appellants,

vs.

United States of America,

Appellee.

APPELLANTS' OPENING BRIEF.

To the Honorable, the Court of Appeals of the United States for the Ninth Circuit:

This is an appeal from that part of a judgment of the District Court, the Honorable Gilbert F. Jertberg presiding, in the above-entitled proceeding in eminent domain, in which said Court adjudged and decreed that the United States was entitled to condemn appellants' land, and from those orders of said Court which denied appellants' motions to set aside the Declaration of Taking and to vacate and set aside the *ex parte* judgment thereon.

Jurisdiction.

Jurisdiction of the District Court was invoked under Section 1358 of Title 28, U. S. C. A., giving jurisdiction to said Court in all proceedings to condemn real estate for the use of the United States. Final judgment in said action was docketed and entered November 13, 1956 [R. 196]. The judgment was amended to correct a mathematical error on December 14, 1956 [R. 200]. Appellants filed Notice of Appeal on February 11, 1957 [R. 202]. The jurisdiction of this Court rests upon Section 1291 of Title 28, U. S. C. A.

Statement of Facts.

The United States instituted condemnation proceedings against appellants'[1] property, approximately three hundred sixty acres of land in Kern County, California, on February 27, 1953, by filing its Complaint in Condemnation and by filing a purported Declaration of Taking[2] [R. 1-12]. On the same date, the United States deposited in the registry of the Court, the sum of $205,000.00 representing the estimated just compensation for

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[1]Appellants are E. S. McKendry, also known as Eugene S. McKendry, his wife, Florence Lowe Barnes McKendry, also known as Pancho Barnes, and William Emmert Barnes, the son of Pancho Barnes. The character of the interests and estates owned by each of the Appellants in the subject property is not in issue; together their interests represented fee simple title to the subject property. [R. 184-187.]

[2]The validity of the Declaration of Taking was challenged by Appellants in the trial court and is challenged upon this appeal. Evidence relating to the Declaration of Taking, its legal effect, and that of the decree entered thereon, are discussed in later sections of the Brief.

the property [R. 184]. An *ex parte* order on the Declartion of Taking was entered March 2, 1953, confirming title in the United States [R. 13-17].

The United States thereafter sought an order for immediate possession of the property [R. 319]; appellants countered with motions to dismiss, to set aside the Declaration of Taking and the judgment entered thereon [R. 17-29]. The Honorable Campbell Beaumont, late district judge, ordered the premises surrendered on May 22, 1954; a further order postponed surrender until July 24, 1954 [R. 50]. By stipulation and agreement of the parties the time for surrender or possession was extended to August 7, 1954 [R. 187]. The District Court denied appellants' motions on the ground that appellants' withdrawal of a part of the deposit foreclosed them from objecting to the taking [R. 29]. Appellants appealed these orders. This Court held that the withdrawal of the deposit did not foreclose appellants from challenging the validity of the taking, but the Court dismissed the appeal as premature upon motion of the Government.[3]

In April, 1955, appellants renewed their motions to dismiss the condemnation action and to set aside the Declaration of Taking and the *ex parte* judgment entered thereon [R. 54-60, 70-92]. The principal grounds for

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[3]This Court's opinion is reprinted in the Record at pp. 49-50. The decision is reported *sub. nom. McKendry v. United States,* 219 F. 2d 357 (1955). A companion appeal was taken from the grant of a temporary injunction which this Court dismissed as moot [R. 53-54].

appellants' motions were that (a) the Declaration of Taking was materially altered after its execution without authority or consent, (b) the Declaration of Taking and the deposit were not made in compliance with the applicable statutes; and (c) the condemnation action was not instituted in compliance with the statute in that the acquiring agency's determination of necessity was not made in good faith, but was arbitrary [R. 54-60, 70-92]. The Honorable Gilbert H. Jertberg, District Judge, heard the matter upon affidavits filed by the parties and upon oral testimony and thereafter entered orders denying appellants' motions [R. 159-179].[4] The Court, *sua sponte,* struck from appellants' Amended Answer all allegations therein which were directed to the validity of the taking [R. 179-181] on the ground that such matters had theretofore been determined and had become the law of the case [R. 589-590].

Commencing June 5, 1956, a jury trial was held in which the issue was confined to the fair market value of the subject property as of February 27, 1953, the date of the filing of the Declaration of Taking [R. 188]. The jury found the fair market value on that date was $377,500.00 [R. 192]. No issue is raised on this appeal in respect of the jury trial on the compensation aspect of the proceedings.

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[4]The trial court's opinion is reprinted at pp. 159 *et seq.* of the Record; the affidavits filed in the course of the hearing and the evidence is discussed in detail in later sections of this Brief.

The District Court tried certain collateral issues in connection with the condemnation proceedings in July and August, 1956, none of which is in issue on appeal [188-191].

Specifications of Error.

Appellants respectfully submit that the District Court erred in the following particulars:

1. The trial court erred in denying appellants' motion to set aside the Declaration of Taking and the *ex parte* judgment entered thereon in that

(a) The Declaration of Taking herein filed was void because it was materially altered after its execution without the knowledge or consent of the condemning authority; and

(b) The filing of said Declaration of Taking did not comply with the provisions of the Declaration of Taking Act, and, therefore there was no statutory authorization for said taking.

2. The trial court committed prejudicial error in receiving into evidence and considering upon the hearing of appellants' said motions, documents introduced by the Government which were inadmissible.

ARGUMENT.

I.

The Declaration of Taking Herein Filed Was Invalid and Ineffective to Transfer Title to the United States.

A. The Declaration of Taking Was Materially Altered After Its Execution Without the Knowledge or Consent of the Assistant Secretary of the Air Force, Who Executed the Instrument.

1. The Declaration of Taking Filed With the District Court Was Altered After Its Execution.

The original Declaration of Taking filed with the District Court[5] shows alterations on the face of the instrument. The document reveals the language of the instrument as it was originally drafted as well as the alterations. The following changes are apparent:

(a) The name of the case was *"United States v. 1,710.3 Acres of Land,* in the County of Kern, State of California; *Ethel Petrovna Rice, et al."* The description of the land taken and the name of the defendant were stricken out with typewritten "X's", The words "360 Acres of Land" and "E.S. McKendry, *et al.*" were substituted, by adding these names to the original designation.

(b) The document had been entitled "Declaration of Taking No. 2." This language was stricken in the same manner by crossing out the term "No. 2."

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[5]The original document appears in the typewritten record on this appeal at pp. 6 *et seq.* The alterations were not reproduced and do not appear in the printed record. See pp. 7 *et seq.* of the printed record.

(c) The document had been numbered "1201-ND"; the number was stricken in the same manner and the number "1253-ND" was substituted.

(d) On the second page of the document, beginning at line 16, the words "and is a description of part of the lands in the amended complaint in condemnation filed in the above-entitled cause," appeared; the word "amended" was stricken.

The instrument signed by E. V. Huggins Assistant Secretary of the Air Force was executed February 3, 1953 in Washington, D. C. [R. 10].

The changes were made on the instrument by the direction of August Weymann, then an attorney in the Lands Division of the Department of Justice in Los Angeles on February 27, 1953 [R. 133, 533-34].

2. The Alterations Were Made Without Authority and Without the Knowledge or Consent of the Assistant Secretary of the Air Force.

Assuming for the purpose of this argument that the District Court properly received and considered the documents attached to the Affidavit of Richard A. Lavine, Assistant United States Attorney [R. 99-129], the documents themselves show that there was no authority to alter the Declaration of Taking. The documents attached to the Affidavit of Richard A. Lavine were asserted to constitute the complete file bearing upon the Declaration of Taking and the manner in which it was filed [R. 459-460].

The original document was prepared by William M. Curran, an attorney doing legal work for the Corps of Engineers [R. 461] for a case entitled *United States v. 1,710.73 Acres of Land,* in the County of Kern, State

of California, Ethel Petrovna Rice *et al.,* on *November 24, 1952* [R. 466]. He did not make the alterations which appear on the face of the instrument filed in this action [R. 465-466]; the alterations were made after the paper left the office of the Engineers [466].

On *December 1, 1952,* the District Engineer, Los Angeles, received a teletype from the South Pacific Division Engineer at San Francisco, which directed preparation of a declaration of taking for appellants' property if an option could not be obtained for it.[6]

Colonel W. R. Shuler, District Engineer, in the Los Angeles Office forwarded the original Declaration of Taking to the Division Engineer in San Francisco with a cover letter dated December 4, 1952, which stated, in part:[7]

> "Inclosed is Declaration of Taking assembly covering these tracts, in which the declaration is indentified as Declaration of Taking No. 2 in Condemnation Case No. 1201-ND Civil. *The land described in the Declaration of Taking is not presently embraced by said condemnation action and will require amendment to include Tracts Nos. L-2040, L-2043, L-2071 and L-2072 therein."* [Emphasis added.]

A copy of the Declaration of Taking assembly was sent by the Chief of the Acquisition Branch of the Real

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[6]The entire contents of the teletype were: "Chief of Engineers ENGLP 2336 dated 28 Nov. 1952. Quote reference your letter 7 Nov. 52 concerning Pancho Barnes McKendry property, Edwards Air Force Base, California. If option cannot be obtained submit condemnation with declaration of taking." [R. 462-463].

[7]The entire letter is reproduced in the printed record at pages 103 *et seq.*

Estate Division to the United States Attorney's office in Los Angeles on December 8, 1952, according to a letter attached to one of the Government's affidavits: the letter, however, also bears alterations.[8]

There is no evidence in the Record, whether, or in what manner, the Declaration of Taking assembly was forwarded to the Assistant Secretary of the Air Force. However, the Government filed an affidavit[9] to which there was attached a photostatic copy of a copy of a letter addressed to the Attorney General, which bears a rubber-stamp signature "E. V. Huggins, Assistant Secretary of the Air Force;" the letter refers to the action, *United States v. 1,710.73 Acres of Land,* and to the "Enclosed Declaration of Taking No. 2 to be filed in said proceeding for the condemnation of the fee simple title to 360 acres of land . . . as described in the Declaration of Taking" [R. 109]. That document contains the statement:

> "The lands described in the enclosed declaration of taking are not included in the pending condemnation proceeding. It is, therefore, requested that prior to the filing of the enclosed declaration of taking you take the necessary action to amend the complaint and other pleadings on file in the proceeding so as to include the 360, acres of land referred to above and set forth in the enclosure hereto" [R. 110].

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[8]The letter showing alterations is reproduced in the printed record at page 102. The number "1201" has been stricken and the number 1253 was substituted; the words "It will be necessary to Amend Comp." were stricken, and the words "See Report of negotiations to date att. hereto" are added in pencil; the words ("Pancho Barnes tracts)" appear as pencilled additions.

[9]The Affidavit of Richard A. Lavine appears in the printed record at pages 99 *et seq.*

The photostatic copy of this document does not bear any letterhead. The date was not typed. The date "Feb. 3, 1953" appears in the document filed with the Court[10] in pen and ink, followed by the marginal notation "R.A.L."

The Government filed with the Court a photostatic copy of a letter dated February 5, 1953, from James M. McInerney, Assistant Attorney General, in Washington to Walter S. Binn, United States Attorney in Los Angeles, enclosing a "certified copy of a letter dated February 3, 1953, from the Honorable E. V. Huggins" [R. 111] requesting

> "the amendment of the condemnation proceeding entitled United States v. 1, 701.73 Acres of Land . . . Civil No. 1201-ND, and the filing of Declaration of Taking No. 2, together with an original and two copies thereof" [R. 111-12].

The letter further stated:

> "Please prepare and file an amended complaint including the additional land described in the enclosed Declaration of Taking No. 2, file the declaration and obtain the entry of a decree thereon providing for immediate possession of the land . . ." [R. 112].

On February 20, 1953, August Weymann prepared a letter for the signature of Walter S. Binns, United States Attorney, in which he requested authority from the Attorney General to file a separate action to condemn the property described in Declaration of Taking No. 2

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[10]The original document appears as pages 128-129 of the typewritten record on appeal; the printed copy of the document appears in the record at pages 109-110, but the characteristics of the original to which the Court's attention has been directed cannot be observed in the record as printed.

[R. 113, 114, 130, 132]. The Government produced a copy of a telegram dated February 25, 1953, received the following day, from an Assistant Attorney General to Walter S. Binns, which stated:

> "Reurlet February 20 Civil 1201ND. Satisfactory to institute new case covering land declaration of taking 2" [R. 121].

August Weymann prepared a complaint in condemnation for the subject property and filed it on February 27, 1953. The case was numbered 1253-ND. On the same date, August Weymann altered the Declaration of Taking in the manner heretofore described [R. 133] and filed it [R. 12].

Neither the Assistant Secretary of the Air Force nor the Attorney General could possibly have seen or approved the alteration of the Declaration of Taking *before* it was filed. The document could not have been changed in Los Angeles, sent to Washington, and filed in Los Angeles on the same day.

It is equally apparent from the documents filed by the Government, that the Secretary of the Air Force, the Assistant Secretary of the Air Force and the Attorney General never saw the altered documents after they were filed in this action.

On March 3 and 4, 1953, the United States Attorney sent copies of the Complaint and the *Decree* on Declaration of Taking to the District Engineer and to the Department of Justice in Washington [R. 122, 123]. On March 17, 1953, the Attorney General wrote to the Secretary of the Air Force in respect of the proceeding and sent to him "certified copies of the complaint in condemnation and the *decree* on declaration of taking"

[emphasis added. R. 128-129]. Neither the original Declaration of Taking showing alterations, nor a "corrected" first page of the Declaration of Taking, nor any copy of the Declaration of Taking was sent to the Secretary of the Air Force or to the Assistant Secretary of the Air Force who executed the instrument.

3. The Attorney General Had No Authority to, and Did Not, Authorize the Alteration of the Declaration of Taking.

Congress delegated authority to acquire land for base expansion by condemnation to the Secretary of the Air Force, for the purposes and in the manner specified by Congress.[11]

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[11]Act of June 17, 1950, Pub. L. 564, 64 Stat. 236, provides, in pertinent part, "The Secretary of the Air Force, under the direction of the Secretary of Defense, is hereby authorized to establish or develop installations and facilities by the construction, installation or equipment of temporary or permanent public works, including buildings, facilities, appurtenances and utilities as follows. . . . [64 Stat. at 242] Muroc Air Force Base, California: Quartermaster warehouse, electric system, *land for base expansion,* unconventional fuel storage, water system, radar and telemetering station, hangars, pavements, shop and warehouse, rocket static test facilities, barracks, $26,654,280." [Emphasis added.]

Public Law 564 was the statute upon which the Government relied as specific authority for the taking; the Government also relied on general statutes, the Act of Congress approved August 1, 1888, 25 Stat. 357, 40 U. S. C. Sec. 257; Act of Congress approved August 18, 1890, 26 Stat. 316, as amended July 2, 1917, 40 Stat. 241 and April 11, 1918, 40 Stat. 518, 50 U. S. C. Sec. 171, which acts authorize the acquisition of land for military purposes; the Act of Congress approved August 12, 1935, 40 Stat. 610, 611, 10 U. S. C. Sec. 1343 a, b, and c, authorizing the acquisition of land for Air Force Stations and Depots; the National Security Act of 1947 approved July 28, 1947, 61 Stat. 495, the Act of Congress approved September 6, 1950, Pub. L. 759, appropriating funds for such purposes [R. 4].

Congress has also authorized a special procedure by which the acquiring authority may acquire title in the name of the United States without awaiting the outcome of the condemnation action: this is the Declaration of Taking Act, 40 U. S. C. A., Section 258a.[12]

Strict compliance with condemnation statutes is required, and, in determining compliance, statutes are strictly construed. (*Union Electric Light & Power Co. v. Snyder Estate Co.,* 65 F. 2d 297, 308 (8th Cir.); *United States v. 2.4 Acres of Land,* 138 F. 2d 294, 298 (7th Cir. 1943); *United States v. Bauman, supra,* 56 Fed. Supp. at 111-112:

> "It was the intention of Congress that the declaration of taking should correspond with the allega-

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[12]The statute provides: "In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaration that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—(1) A statement of the authority under which and the public use for which said lands are taken. (2) A description of the lands taken sufficient for the identification thereof. (3) A statement of the estate or interest in said lands taken for said public use. (4) A plan showing the lands taken. (5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

"Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compen-

tions of the 'petition.' Unless the formalities prescribed by the enactment are strictly complied with, the title would not pass.")

The Attorney General is given authority to *commence* condemnation proceedings upon application to him by the condemning authority.[13]

A Declaration of Taking does not "commence" an action, since it cannot be filed until a condemnation suit has otherwise been started. The Declaration of Taking operates to acquire title immediately upon its being filed

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sation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

"Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

"Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable."

[13]28 U. S. C. A. Sec. 257 provides: "In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the *Attorney General of the United States, upon application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, shall cause proceedings to be commenced for condemnation* within thirty days from the receipt of the application at the Department of Justice." [Emphasis added.]

with the estimated compensation deposited [28 U. S. C. A. §258a *supra*].

The Attorney General is not given any authority to determine the time of acquiring title to condemned land. And he is not given any authority to exercise any discretion in deciding how and in what manner or when to file a Declaration of Taking. Congress has committed the determination of the time of acquisition of property, particularly by means of filing a Declaration of Taking, to the acquiring officer. (*United States v. 23.263 Acres of Land,* 45 Fed. Supp. 163 (D. C. Wash. 1942); *Cf. Matter of Townsend,* 39 N. Y. 171, 174 (1868); see Lavine, "Extent of Judicial Inquiry into Power of Eminent Domain," 28 *So. Cal. L. Rev.,* 369, 370, 371 (1955) ("The administrative agency or official must determine the time when the condemnation action is to be brought and the date when possession of the property shall be sought.").)

The filing of the altered Declaration of Taking in this case was contrary to the provisions of Section 258a; that statute states, in part, that

> "the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition . . ."

The Declaration of Taking which was filed in this case was not the Declaration of Taking which was "signed by the authority empowered by law" because the instrument which had been signed was changed after it was executed. When it was signed, it applied to a different case.

Whatever may have been the authority of the Attorney General in respect of commencing a condemnation action

by filing an amended complaint or a new complaint, he had no authority to authorize the alteration of the Declaration of Taking or to authorize the filing of an altered Declaration of Taking, or to determine that the property should be taken at some time other than that directed by the Assistant Secretary of the Air Force.

Indeed, there is nothing in the record to show that the Attorney General did purport to authorize the filing of a Declaration of Taking which showed alterations on its face, or that the Attorney General knew that the alterations had been made without the consent of the Assistant Secretary of the Air Force.

Authority cannot be found from any source whatever for the alteration of the Declaration of Taking in the case at bar.

4. The Alteration Was Material.

A Declaration of Taking is not merely a pleading. It has the effect of an involuntary deed from the landowner to the Government.[14] The conveyance thereby made passes title to the Government without any prior notice or opportunity to be heard.[15]

This Court defined the term "material alteration" and discussed the effect of such a change in *Southern California Edison Co. v. Hurley,* 202 F. 2d 257 (9th Cir. 1953). A bank had altered an assignment of stock interest by changing the assignees' designation from Elizabeth J. Price *or* George Burton, to Elizabeth J. Price *and* George Burton, as joint tenants. The assignor,

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[14]40 U. S. C. A. Sec. 258a, set out *supra.*

[15]The title conveyed to the Government is, however, defeasible, *Catlin v. United States,* 324 U. S. 229 (1944).

Hurley, had no knowledge of the change. This Court, speaking throught Mr. Justice Pope, held the instrument invalid and said:

> "It seems clear that if this unauthorized alteration was a material one, then the instrument was wholly void and the legal effect of its delivery to the defendant company was no different than if Hurley's name had in fact been forged . . . The general rule is that 'if the legal import and effect of the instrument is changed it does not matter how trivial the change may be, or whether it is beneficial or detrimental to the other party sought to be charged, it is a material alteration and invalidates the instrument.' . . . In discussing the question of what constitutes a material change in a written instrument sufficient to render the same void, it was stated in Laskey v. Bew, 22 Cal. App. 393, 396, 134 Pac. 358, 360: 'The materiality of the change, however, does not depend upon whether or not the party not consenting thereto will be benefited or injured by the change, but rather upon whether or not the change works *any* alteration in the meaning or legal effect of the contract . . . A material alteration is one that works some change in the rights, interests, or obligations of the parties to the writing.'" [Emphasis added.]

The changes which are made in the Declaration of Taking filed in this action had the effect (a) of making the Declaration of Taking apply to a different action than that for which it was executed, and (b) of changing the *time* at which it could have been filed.

Assistant Secretary of the Air Force, E. V. Huggins, who executed the original document, was explicit in his directions to the Attorney General in respect of the Declaration of Taking he signed. The Assistant Secre-

tary directed that the Declaration of Taking be filed in the action entitled *United States v. 1710.73 Acres of Land,* No. 1201-ND *after* that action had been amended to include the subject property.[16]

The Assistant Secretary thus set the time for filing the Declaration of Taking as that date upon which the then pending action could be supplemented to bring the subject property within that action. In order to bring the subject property within that action, the Government would have had to file an amended and *supplemental* complaint. As Mr. Justice Fee stated in *United States v. Bauman,* 56 Fed. Supp. 109, 111 (D. Ore. 1943):

> "[E]vents occurring subsequent to the filing of an original complaint must be set up by supplemental complaint rather than mere amendment."[17]

Leave of court must be obtained before a supplemental complaint can be filed, although ordinary amendments may be made to a condemnation complaint without leave at any time before trial on the compensation issue.[18]

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[16]The Secretary said: "The lands described in the enclosed declaration of taking are not included in the pending condemnation proceeding. It is, therefore, requested that prior to the filing of the enclosed declaration of taking you take the necessary action to amend the complaint and other pleadings on file in the proceeding so as to include the 360 acres of land referred to above and set forth in the enclosure hereto." [R. 110.]

[17]The *Bauman* case was decided before the Federal Rules of Civil Procedure were made applicable to condemnation cases. But Federal Rule of Civil Procedure Rule 15(d) prescribes the same procedure.

[18]Rule 71A of the Federal Rules of Civil Procedure applies specifically to condemnation cases; Rule 71A(f) permits the amending of pleadings without leave of court, but in terms it does not encompass supplemental pleadings. Rule 71A(a) makes the Federal Rules applicable to condemnation actions, except where inconsistent with the express provisions of Rule 71A(a). Since there is no provision in Rule 71A applying to supplemental pleadings, Rule 15(d) applies, requiring leave of court to file a supplemental pleading.

The alteration of the Declaration of Taking necessarily changed the date upon which title could pass to the Government.

The reasons are as follows: (a) a Declaration of Taking cannot be filed *before* a Complaint in condemnation is filed;[19] (b) the Declaration of Taking executed by the Assistant Secretary in this case could not have been filed in the then pending action until that action had been amended and supplemented to include the property covered by the Declaration of Taking;[20] (c) an amended and supplemental complaint could not have been filed without leave of court duly obtained after filing an appropriate motion with moving papers;[21] (d) the United States Attorney's office received the check for the estimated compensation to be deposited with the Declaration of Taking on February 20, 1953 [R. 113]; (e) motion day in the United States District Court, Southern District of California, Northern Division, is Monday;[22] (f) the earliest Monday upon which the motion for leave could have been heard would have been Monday, March 2, 1953; (g) assuming, for argument, that the motion for leave were granted on the day it was sought, the amended and supplemental complaint could not have been filed before March 2, 1953, and, therefore, the Declaration of Taking as originally executed could not have

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[19]28 U. S. C. A. Sec. 258a, stating, in part: "In any proceeding in any court of the United States . . . the petition may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States." See *United States v. Bauman, supra,* 56 Fed. Supp. 109.

[20]*United States v. Bauman, supra.*

[21]*Ibid.;* Rules of Civil Procedure, Rule 15(d).

[22]Local Rules of Southern District California, Rule 3(a).

been filed and title conveyed to the Government before that date; (h) the altered Declaration of Taking was filed February 27, 1953.

The date of the filing of the Declaration of Taking is highly material in a condemnation action, since that date is the date of taking of the property and, therefore, the date as of which the valuation is made [28 U. S. C. A. §258a]. It is the date from which interest accumulates on the ultimate award.[23]

An alteration of an instrument by changing the date thereof or entering a date where none is given which has some effect upon the rights of the parties is a material alteration. (*United States v. McCain,* 1 F. 2d 985 (E. D. Pa. 1924) (alteration of a date in court records); *Morley-Murphy Co. v. Van Vreede,* 233 Wis. 1, 269 N. W. 664, 666 (1936) (changing date of payment in a contract); *Fitzgerald v. Lawson,* 78 A. 2d 527 (N. H. Sup. Ct. 1951) (change in date of real estate broker's contract); See, Williston, "Discharge of Contracts by Alteration," 18 *Harv. L. Rev.* 165, 168 (1904).)

B. The Altered Declaration of Taking Was Void.

The material alteration of an instrument without authority or consent renders the instrument void. (*United States v. Galbraith,* 2 Black. [67 U. S.] 394

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[23]28 U. S. C. A. Sec. 258a, stating, in part "[S]aid compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property *as of the date of taking, from said date to the date of payment.* . . ." (Emphasis added.)

(1862) (alteration of deed by interlineation made after execution of the deed will avoid it, though in an immaterial part); *Morris's Lessee v. Vanderen,* 1 Dall. [1 U. S.] 64 (1672); *Southern California Edison Co. v. Hurley,* 202 F. 2d 257 (9th Cir. 1953); *Fitzgerald v. Lawson,* 78 A. 2d 527 (N. H. 1951); *Wyman v. Utech,* 256 Wis. 234, 40 N. W. 2d 378 (1949); *Ark-La Elec. Corp. v. Randall,* 205 Ark. 646, 169 S. W. 2d 61 (1943); *Ruwaldt v. W. C. McBride, Inc.,* 388 Ill. 285, 57 N. E. 2d 863 (1944); *Montgomery v. Bank of America,* 85 Cal. App. 2d 559, 193 P. 2d 475 (1948).)

Since the Declaration of Taking was void, the action should be treated as if no such instrument had been filed. Title could not pass to the United States as of the date of the filing of the Declaration and the deposit of estimated compensation.

It is well settled that, in absence of filing of a Declaration of Taking, title passes to the United States at that time the United States pays and the condemnee receives just compensation for his property. (*United States v. Rogers,* 255 U. S. 163 (1920); *Cherokee Nation v. Southern Kansas R. Co.,* 135 U. S. 641, 659 (1890); *Moody v. Wickard,* 136 F. 2d 801 (D. C. Cir. 1943), *cert. denied* 320 U. S. 775 (title does not pass until payment of just compensation even though the Government may be in actual possession of the property before that time); *Hanson Lumber Co. v. United States,* 261 U. S. 581, 587 (1923).)

II.

The Ex Parte Decree Entered Upon the Altered Declaration of Taking Was Invalid.

The *ex parte* "judgment" confirming title in the United States is not a judgment at all. It adds nothing to the Declaration of Taking. (*United States v. Sunset Cemetery Co.,* 132 F. 2d 163, 164 (7th Cir. 1942); *United States v. 16,572 Acres of Land,* 45 Fed. Supp. 23 (D. C. S. D. Tex. 1942); *United States v. 12,918.28 Acres of Land,* 50 Fed. Supp. 712 (W. D. La. 1943).) The decree itself cannot constitute a judgment because it is entered without any prior notice or opportunity to be heard.[24]

If the Declaration of Taking is a nullity, the *ex parte* judgment entered upon is it likewise a nullity. (*Cf. McKendry v. United States,* 219 F. 2d 357 *supra; City of Oakland v. United States,* 124 F. 2d 959, 963 (9th Cir. 1942).)

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[24]The United States Supreme Court has characterized a judgment of condemnation, without prior notice or opportunity for hearing, as "a solemn fraud" and not a judicial act at all. *Windsor v. McVeigh,* 93 U. S. 277, 278, 279 (1876). To the same effect, *Hassall v. Wilcox,* 130 U. S. 493 (1888). The principle is implicitly recognized by the Court in *Catlin v. United States, supra,* 324 U. S. 229 (1944).

III.

The Government Failed to Sustain Its Burden of Proving Instruments Were Altered With Authority and Consent of the Assistant Secretary of the Air Force.

Not only did the Government claim rights founded upon a Declaration of Taking showing alterations on its face, but the Government also relied upon other documents which had apparent alterations.[25]

The proponent of an instrument bearing apparent alterations has the burden of explaining the alterations and of establishing that they were made under such circumstances that they do not affect the proponent's right to recover.

Thus, in *Smith v. United States,* 2 Wall. [69 U. S.] 219, 231, 232 (1864), the United States brought suit against a surety on a faithful performance bond which showed an erasure of one of the names on the face of the bond. The Supreme Court held the lower court erred in permitting the bond to be introduced in evidence by the Government, because the Government had failed to sustain its burden of proving consent by the defendant to the alteration. Mr. Justice Clifford, speaking for the Court, said:

> "[A] party claiming under an instrument which appears on its face to have been altered [is] bound

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[25]The documents referred to are certain of the instruments attached to the Affidavit of Richard A. Lavine, filed by the Government in opposition to appellants' motions to dismiss and set aside the Declaration of Taking and the *ex parte* judgment thereon [R. 99 *et seq.*].

to explain the alteration and show that it had not been improperly made." [P. 231.]

. . . . . .

"[T]he party producing the instrument and claiming under it . . . [must] show that the alteration was made under such circumstances that is does not affect his right to recover."

In *United States v. McCain,* 1 F. 2d 985 (E. D. Pa. 1924), the Court held inadmissible court records and an affidavit in which certain dates had been changed. The Court said the proponent of a document showing alteration must account for them. At 986, the Court said:

"[There is] no rule of evidence which makes an apparent material alteration in a writing evidence, even if it produced as a court record, unless the party producing it offers evidence to show that the alteration was made before the paper was signed. . . ."

The Court in *Ruwaldt v. W. C. McBride, Inc.,* 388 Ill. 285, 57 N. E. 2d 863, 867 (1944), holding an oil lease void by reason of the striking through of certain clauses in the lease said:

"Where an alteration in a deed is admitted or where it is established by inspection, the burden of proof shifts to the person claiming the benefit of the instrument, as altered, to show the alteration was made under circumstances rendering it lawful [citations omitted]."

The Government completely failed to establish that the alterations were proper. In effect, it admitted that the changes in the Declaration of Taking were made after

the instrument had been executed by the Assistant Secretary of the Air Force [Affidavit of August Weymann, R. 133-134; 553-554]. The Government introduced no competent evidence[26] to establish the existence of any authority to change the Declaration of Taking. On the contrary, the testimony of Joseph F. McPherson, an United States Attorney, clearly indicated that there was no such authority from the Assistant Secretary of the Air Force, or anyone else.[27]

No explanation of any kind was offered by the Government in respect of the alterations apparent on the face of the documents attached to the Affidavit of Richard A. Lavine.[28]

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[26]Certain documentary evidence relied upon by the Government was not competent because the documents were not properly authenticated. The point is discussed in the section hereafter following.

[27]In response to the question, "Was there any authority ever from the Secretary of Air who made the paper [the Declaration of Taking]?", Mr. McPherson testified: "None would be required, and as far as I know no express authorization or direction was given to him. . . ." [R. 554.] Mr. McPherson was asked whether any certified copy of the "corrected" declaration of taking was sent to the Secretary of the Air Force or the Attorney General [R. 555, 556]; Mr. McPherson testified that "I don't know that there was any. Ordinarily we would not transmit the declaration back to the Attorney General. . . ." [R. 556.] He was asked whether "[T]he United States Attorney's office or . . . the Air Force headquarters . . . ever had a true, corrected copy, as we have seen it, of the declaration of taking." Mr. McPherson testified, "Not according to my file there wasn't. . . ." [R. 557.]

[28]Interlineations and other changes were made on the face of the document identified as Exhibit 1 attached to the Affidavit [R. 102]; a date was added on the copy of a letter from Col. Shuler to the Division Engineer [R. 103]; a date was added and handwritten initials appear on the document identified as Exhibit 2, the letter from the Air Force Secretary to the Attorney General [R. 109]; additions in handwriting were made to the telegram from the Assistant Attorney General to the United States Attorney [R. 121].

The Court permitted the documents to be filed with the Affidavit, without allowing objections to them.[29]

The Government utterly failed to establish authority for acquiring title by means of the altered Declaration of Taking, and it also failed to lay any proper foundation for the receipt of documents which had apparent changes on them.

IV.

The Trial Court Committed Prejudicial Error in Receiving Into Evidence and Considering Inadmissible Documents in the Hearing Upon Appellants' Motions to Set Aside the Declaration of Taking.

The sole document purporting to constitute authorization by the Assistant Secretary of the Air Force to institute the condemnation action, and to file a Declaration of Taking in this action was a document identified as Exhibit Number Two, attached to the Affidavit signed by Richard A. Lavine [R. 109-110].

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[29]Appellants attempted to object to the introduction of matters contained in Affidavits filed by the Government on the hearing of appellants' motions to set aside the Declaration of Taking. At 570 of the Record, the following appears:

"The Court: 'Do you want to submit that [affidavit of General Hottoner] as an exhibit?' Mr. McPherson: 'Well, I just offer it in evidence. It is an affidavit.' The Court: 'Yes.' Miss Barnes: 'May I read it first to see if I want it in evidence?' Mr. McPherson: 'You don't have any choice in the matter.' The Court: . . . 'Ordinarily these motions of this type are heard upon affidavits. The affidavit should be filed. You have furnished a copy to Mrs. Barnes?' Mr. McPherson: 'Yes.' The Court: 'And likewise the affidavits of Mr. Weymann and Mr. Lavine will be filed.' "

Appellants did, however, complain of the alterations and additions in the documents, including the Declaration of Taking, and urged the inadmissibility of such documents in their motion to set aside the Declaration of Taking [R. 90-91] and answering Affidavit [R. 147-149].

This document was not admissible in evidence and uld not properly be considered by the District Court, cause the document was neither an original nor a duly thenticated copy of an original document.

The document was a photostatic copy of a certified py of a letter.[30] No attempt was made to produce introduce a certified copy of the original letter.[31]

There was also attached to the Affidavit a photostatic py of a copy of a letter from the Attorney General to arold E. Talbott, Secretary of the Air Force [R. 128-9]. It is not certified or otherwise authenticated.[32]

Similarly the Exhibits identified as 4, 6, 8, 9, 10, 11 id 12 are photostatic copies of copies.

None of these documents is a duly authenticated copy an official document as required by Section 1733(b) 28 U. S. C. A.[33]

None of the documents was admissible or should have en considered by the trial court. The precise question

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[30]The characteristics of the document do not appear in the printed cord. The characteristics do, however, very clearly appear in the pewritten record, at pages 127-128, from which the printed cord was prepared.

[31]The unexplained alterations, previously discussed, are also ounds for refusing admission of the document into evidence.

[32]Mr. Lavine's affidavit states simply: "I have examined the icial office files of the United States Attorney's Office pertaining the above entitled case and found therein the documents as out below. True photostats of such documents are attached reto and incorporated herein as though at length set forth." . 99.] In the case of documents which are themselves copies, reafter photostated, all Mr. Lavine's affidavit can possibly affirm that these are true copies of copies; he cannot aver that they e true copies of the originals.

[33]The statute provides: *"Properly authenticated* copies or tran-ipts of any books, records, papers, or documents of any depart-nt or agency of the United States shall be admitted in evidence ually with the originals thereof." (Emphasis added.)

has recently been decided by the Court of Appeals for the Second Circuit in *Yung Jin Teung v. Dulles,* 229 F. 2d 244 (2d Cir. 1956). The Court was considering the propriety of the granting of the Government's motions for summary judgments in actions by ten plaintiffs to obtain declarations of citizenship. The matter was heard on affidavits. Plaintiffs' affidavits raised the issue that the Government had denied their rights as citizens by refusing to issue travel documents to them. The Court held the granting of summary judgments was improper because the Government introduced no affidavits or documents which could properly be considered as evidence; therefore, the statements of the plaintiffs in their affidavits were uncontradicted. At 246, the Court said:

> "At the outset we must consider whether in any of the cases the government has presented any evidence or affidavits which were entitled to the consideration of the District Court. In each case the affidavit of the Assistant United States Attorney is not made on personal knowledge, but merely recites what is contained in the documents attached thereto. *Since the documents themselves are not affidavits, we can consider them only if they constitute evidence which would be admissible at trial.* [Emphasis added.]
>
> "[T]he basic document is a photostatic copy of a paper entitled 'Status Reports of Pending Cases in which Civil Actions Have Been Filed.' Each such report contains information as to the history of the passport application and comments under a heading entitled 'Principal cause of delay in concluding case.' Each contains at the bottom after the words 'Examined by' the signature of an otherwise unidentified individual. Each is accompanied by a photostatic copy of a certificate signed by an authenticating of-

ficer of the Department of State for the Secretary or Acting Secretary. The certificate states only that 'the document hereunto annexed is a pertinent document from the passports files of [the particular applicant].' In another case . . . the documents are the same except that the 'Status Report' is a typewritten copy rather than a photostat. And in another . . . the 'Status Report' is a typewritten copy and there is no certificate of the kind described above.

"We are of the opinion that these 'Status Reports' are not admissible as evidence and that the District Court should not have considered them on the motion for summary judgment. They are not 'books or records of accounts or minutes of proceedings" within the meaning of 28 U. S. C. A. section 1733(a). *They are not properly authenticated copies* as required by 28 U. S. C. A. section 1733(b), 1740, and Rule 44 F. R. C. P., 28 U. S. C. A. *Both the typewritten copies and the photostatic copies are uncertified. Even the certificate described above appears in the file only as a photostatic copy of the original certificate.* * * * [Emphasis added.][34]

Appellants urge that the receipt of these unauthenticated, and, in some instances, altered, documents, was ejudicial error, by reason of which appellants' are itled to a new trial on the issue of the authenticity of Declaration of Taking which was filed in this action.

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[34]An additional ground for inadmissibility in that case was the k of personal knowledge of the writer of the document of the ts therein recited.

Conclusion.

The taking of private property for public use frequently works severe hardship on the landowner, which is true in the case of appellants. Appellants have not only been deprived of their land for which compensation has been paid, but also they have been deprived of their going business and the good will which was a part of it for which they have been paid nothing. They have not received even their moving expenses, although they have made application therefor.

The practical possibilities of attacking the appropriation of private property in a condemnation action are minute. Attack in Congress is virtually impossible because the landowner has no prior right to be heard in respect of a project for which his land may be taken; a change in legislation after his property has been taken can give him nothing but spiritual comfort. Attack in the courts is narrowly restricted since the administrative determinations involved in the taking are well insulated from judicial review.

The landowner whose land is to be taken by condemnation has but one protection: the taking must be made under and by virtue of statute. The question whether the statutes under which the taking authority has acted have been fully and strictly followed is a judicial question. It is this question which this Court is earnestly urged to consider in the case at bar.

The Government purportedly took title under the Dec-
ation of Taking Act. The Act permits the use of
hly summary procedure to take private land. The
vernment made the choice of using this procedure, and,
ving done so, it should be required to follow all its
uirements exactly. The Government did not strictly
nply with statutory authority in this case. The Decla-
ion of Taking was materially altered without the
owledge or consent of the Air Force Secretary, whose
ty it was to determine what should be taken for the
ject, how it should be taken, and when it should be
en. The Government did not send the Declaration of
king to the Secretary to obtain his approval for alter-
g it. For ought that appears the Government did not
ke any substantial effort to explain what had been
ne; it did not attempt to introduce properly authenti-
ed documents to support its actions. The Government
s, and should have, the burden of explaining the alter-
ons in the documents in this case. It should have
at burden because the opportunity of the landowner to
ther direct evidence on this subject is very limited.[35]

Under the circumstances of this case, title should not
ss to the Government by virtue of the Declaration of

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[35]The difficulties which beset a landowner attempting to prove
ure of the Government condemning authority to comply with his
tutory duties are well illustrated in *United States v. Richardson*,
4 F. 2d 552 (5th Cir., 1953), in which Government officials
varted every effort of the landowner to utilize ordinary discovery
cedures until the Court stayed the action.

Taking herein filed, without, at the very least, a new trial in which the issue of the validity of the Declaration of Taking can fully be tried and in which the decision of the Court shall be made upon evidence properly admissible.

Respectfully submitted,

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Attorneys for Appellants.